UNITED STATES TAX COURT
WASHINGTON, DC 20217

STEVEN T. WALTNER & SARAH V. WALTNER,	)	**KVC**
Petitioner(s),	)	
v.	)	Docket No. 12722-13 L.
COMMISSIONER OF INTERNAL REVENUE,	)	
Respondent	)	

ORDER

For the reasons that follow, we will order Mr. Wallis to pay $12,637.50 to respondent pursuant to section 6673(a)(2).[1]

Background

Sanctions Previously Issued Against Mr. Wallis

In Tinnerman v. Commissioner, T.C. Memo. 2010-150, aff'd, 448 Fed. App'x 73 (D.C. Cir. 2012), pursuant to section 6673(a)(1), we imposed a penalty of $25,000 on a taxpayer represented by Mr. Wallis. We also warned Mr. Wallis that we would sanction him if he continued to raise frivolous arguments before this Court, stating:

> The attention of petitioner's counsel is directed to Rule 3.1 of the Model Rules of Professional Conduct of the American Bar

[1]Unless otherwise indicated, all section references are to the Internal Revenue Code, as amended and in effect for the year in issue, and all Rule references are to the Tax Court Rules of Practice and Procedure.

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> Association (Model Rule 3.1), applicable here under Rule 201(a), and to section 6673(a)(2). See Takaba v. Commissioner, 119 T.C. 285, 296–305, 2002 WL 31818000 (2002); Nis Family Trust v. Commissioner, 115 T.C. 523, 547–553, 2000 WL 1772511 (2000); see also Powell v. Commissioner, T.C. Memo. 2009–174; Edwards v. Commissioner, T.C. Memo.2003–149, aff'd 119 Fed. Appx. 293 (D.C. Cir. 2005). We recognize that counsel cooperated in presenting this case on the stipulation, but the filings in responses to motions and in briefs demonstrate reckless disregard of the facts and the settled law and contentions so lacking in merit as to be frivolous, dilatory, and subject to sanctions. See, e.g., United States v. Patridge, 507 F.3d 1092, 1095–1097 (7th Cir. 2007) (counsel was sanctioned in part for arguing that a collection hearing could be used to contest previously determined substantive liabilities); Johnson v. Commissioner, 116 T.C. 111, 2001 WL 193666 (2001), aff'd 289 F.3d 452, 456–457 (7th Cir. 2002); see also United States v. Collins, 920 F.2d 619, 624–628 (10th Cir. 1990); United States v. Nelson (In re Becraft), 885 F.2d 547, 548 (9th Cir. 1989) (sanctions were imposed on counsel in criminal cases, notwithstanding greater leeway generally allowed under Model Rule 3.1); Charczuk v. Commissioner, 771 F.2d 471 (10th Cir.1985), aff'd T.C. Memo. 1983–433. We will deny respondent's motion for a penalty against counsel under section 6673(a)(2). However, we issue this warning for the future to present counsel and to those similarly situated.

On appeal, Mr. Wallis did not heed our warning because the Court of Appeals for the District of Columbia Circuit imposed a sanction of $8,000 jointly and severally against him and his client for "pursuing a frivolous appeal." Tinnerman v. Commissioner, 448 Fed. Appx. 73 (citing sec. 7482(c)(4); 28 U.S.C. sec. 1912; Fed. R. App. P. 38), aff'g T.C. Memo. 2010-150.

This did not deter Mr. Wallis from asserting frivolous arguments in the future. In December 2014 he was sanctioned $15,550, pursuant to section 6673(a)(2), in Steven T. Waltner and Sarah V. Waltner v. Commissioner, docket No. 1729-13.

Proceedings Involving Mr. Wallis and Petitioners

Petitioners attempted to recover refunds of allegedly overpaid Federal income tax for 2003-08 by filing suit in the U.S. Court of Federal Claims. See

Waltner v. United States, 98 Fed. Cl. 737, 739 (2011), aff'd, 679 F.3d 1329 (Fed. Cir. 2012). The Court of Federal Claims determined:

> [P]laintiffs in this case did not submit sufficient information for tax years 2004, 2005, 2006, 2007, and 2008 for any of the plaintiffs' returns to be considered valid tax returns. For each of the tax years, the plaintiffs claim zero in tax liability, allege that no wages were received by plaintiffs, and allege that the amount of dividends received each year was zero. The plaintiffs did not provide the IRS with sufficient information for the tax years at issue, such that the IRS could calculate their tax liability, and therefore, the returns filed by the plaintiffs were neither proper returns or proper claims for refund. As the plaintiffs failed to file properly completed, timely returns for each of the tax years at issue, the court lacks jurisdiction for the plaintiffs' claims for refund tax years 2004, 2005, 2006, 2007, and 2008.

The U.S. Court of Appeals for the Federal Circuit affirmed the dismissal of petitioners' refund suit. See, Waltner v. United States, 679 F.3d at 1334. The Supreme Court of the United States denied the petition for certiorari in petitioners' refund suit. See Waltner v. United States, 133 S. Ct. 319 (2012). Mr. Wallis represented petitioners before the Supreme Court. See id. (No. 12-75), available at http://www.supremecourt.gov/Search.aspx?FileName=/docketfiles/12-75.htm (last visited February 9, 2016).

Petitioners subsequently filed four cases in this Court. The deficiencies, accuracy-related penalties and the section 6702 penalties involved in these cases are all the result of petitioners' frivolous position that Mr. Waltner's wages, which are the bulk of their income, were not taxable.

(1) Steven T. Waltner and Sarah V. Walter v. Commissioner, docket No. 8726-11L, regarding a notice of lien filed with respect to both petitioners' liability for section 6702 penalties for 2003-2007; a notice of intent to collect by levy with respect to Mr. Waltner's liability for section 6702 penalties for 2003, 2005, 2006, and 2007; and respondent's efforts to collect by lien and levy both petitioners' 2006 Federal income tax liability. Mr. Waltner entered an appearance in this case and then withdrew it prior to the resolution of the case.

(2) Steven T. Waltner v. Commissioner, docket No. 21953-12L regarding a notice of intent to collect by levy his section 6702 penalty for 2008. Mr. Wallis

entered an appearance in this case, but it was withdrawn in a matter of days. This case is currently pending on appeal to the U.S. Court of Appeals for the Ninth Circuit. Mr. Wallis has entered an appearance in that case.

(3) Steven T. Waltner and Sarah V. Waltner v. Commissioner, docket No. 1729-13 regarding petitioners' Federal income tax deficiency and accuracy-related penalty for 2008. Mr. Wallis entered an appearance in this case and failed to appear at trial.

(4) Steven T. Waltner and Sarah V. Waltner v. Commissioner, docket No. 12722-13L -- this case -- regarding the notice of intent to collect by levy petitioners' section 6702 penalty for 2004. Mr. Wallis entered an appearance in this case, signed the vast majority of the petitioners' filings, and failed to appear at trial. In February 2015, after filing petitioners' post-trial briefs, Mr. Wallis withdrew as counsel. He subsequently resigned as a member of the bar of this Court. In August 2015, the Opinion in this case was issued.

Section 6672(a) Sanctions

In our Opinion we imposed a $15,000 penalty on petitioners pursuant to section 6673(a)(1) because they maintained positions which they had already been warned were frivolous. In the Opinion we noted that Mr. Wallis' conduct in connection with the case also appeared to warrant sanctions. Mr. Wallis was ordered to show cause why we should not require him to pay respondent's excess costs, if any, pursuant to section 6673(a)(2). We also ordered respondent to submit a computation of the excess costs, if any, that respondent incurred.

Mr. Wallis filed a response objecting to the imposition of sanctions. Respondent filed a response requesting that a sanction of $37,650 be imposed on Mr. Wallis pursuant to section 6673(a)(2). Mr. Wallis subsequently filed an opposition to the response filed by respondent. On November 5, 2015, we ordered respondent to provide a more detailed description of the time spent by respondent's counsel so that excess costs could be distinguished from costs ordinarily incurred during the course of litigation. We warned respondent that if such information was not provided that we would be forced to make a reasoned determination as to the difference in the amount of time spent in this case and the amount of time ordinarily spent in litigating a section 6330 Collection Due Process case.

Respondent filed a response requesting that a reduced sanction of $36,300 be imposed on Mr. Wallis pursuant to section 6673. Respondent requests

reimbursement for (1) 25 of the 41 hours worked by Associate Area Counsel Jan Robert Cuatto; (2) 83.25 of the 136 hours worked by Attorney Michael Lloyd; (3) 57 of the 57 hours worked by Attorney Hilary March; and (4) 13 of the 15 hours worked by Supervisory Attorney Bridget Tombul. The average amount of time that Mr. Lloyd spent on CDP cases, excluding cases involving jeopardy collection or taxpayers advancing frivolous positions, from October 27, 2013 to November 14, 2015 was 27.46 hours. The greatest amount of time that Mr. Lloyd spent on such a case was 48.75 hours. Respondent seeks to be reimbursed at the rate of $200 per hour for the work performed by Mr. Cuatto, Mr. Lloyd and Ms. March and $250 per hour for the work performed by Ms. Tombul.

Mr. Cuatto was an attorney with the Internal Revenue Service (IRS), Office of Chief Counsel. He left respondent's employment in late December 2014.

Mr. Lloyd is an attorney with the IRS, Office of Chief Counsel, Small Business/Self-Employed, in Denver, Colorado. He has been employed by the Office of Chief Counsel since September 1991.

Ms. March is an attorney with the IRS, Office of Chief Counsel, Procedure and Administration, in Washington, D.C. Ms. March has been an attorney with the IRS since August 2011.

Ms. Tombul is a Senior Technician Reviewer with the IRS, Office of Chief Counsel, Procedure and Administration in Washington, D.C. She has been an attorney with the Office of Chief Counsel for more than 16 years.

Discussion

If it appears to us that any attorney admitted to practice before this Court has "multiplied the proceedings in any case unreasonably and vexatiously," we may require that attorney to personally pay "the excess costs, expenses, and attorneys' fees reasonably incurred because of such conduct". Sec. 6673(a)(2).

Though Mr. Wallis is no longer an attorney admitted to practice before this Court, he was during the time that he represented the petitioners and this is the period of time at issue for purposes of determining whether he should be subject to sanctions pursuant to section 6673(a)(2). It defies logic that Mr. Wallis should be able to escape sanctions for his actions in this case by surrendering his ability to practice before this Court.

Mr. Wallis also points out that he had withdrawn from the case at the time we ordered him to show cause as to why we should not require him to pay respondent's excess costs pursuant to section 6673(a)(2). As a result, he questions our ability to impose sanctions against him. In his response to our order to show cause, he states, "[t]he Ninth Circuit has held that 'Section 1927 cannot reach conduct of a party who is not involved in an action before the sanctioning court at the time of the conduct.' GRiD Systems Corp. v. John Fluke Mfg. Co., Inc., 41 F.3d 1318, 1319 (9th Cir. 1994)." Mr. Wallis takes the quote from GRiD Systems Corp. out of context.

In GRiD Systems Corp., the Ninth Circuit addresses whether the district court could issue sanctions pursuant to 28 U.S.C. § 1927 for actions taken in state court. This becomes clear when the language quoted by Mr. Wallis is read in context:

> We agree with the Fifth Circuit that §1927 limits a federal court's ability to sanction an attorney for conduct before another court. Matter of Case, 937 F.2d 1014 (5th Cir. 1991). Here, Fenwick & West took no action before the district court. They did not multiply the proceedings in the case before the district court. The suit filed in state court is an entirely separate action, not subject to the sanctioning power of the district court. Section 1927 cannot reach conduct of a party who is not involved in an action before the sanctioning court at the time of the conduct.

Mr. Wallis' actions that subject him to sanctions took place before this Court, not a different court. Mr. Wallis was admitted to practice before this Court and represented petitioners at the time that he engaged in the conduct at issue.

In Harper v. Commissioner, 99 T.C. 533, 545 (1992), we relied upon case law under 28 U.S.C. sec. 1927 (2012) to determine the level of misconduct that justifies sanctions pursuant to section 6673(a)(2). Section 6673(a)(2) and 28 U.S.C. section 1927 (2012) serve the same purpose in different jurisdictions, and the language of the two statutes is substantially identical.

We observed in Harper v. Commissioner, 99 T.C. at 545-546, that although most of the U.S. Courts of Appeals require a finding of bad faith as a condition for imposing sanctions under 28 U.S.C. section 1927 (2012), a few have adopted the lower threshold of recklessness. In Fink v. Gomez, 239 F.3d 989, 993 (9th Cir. 2001), the U.S. Court of Appeals for the Ninth Circuit has stated that "recklessness

suffices for * * * [sanctions under 28 U.S.C. section] 1927, but bad faith is required for sanctions under the court's inherent power." The U.S. Court of Appeals for the District of Columbia has not adopted either standard. See LaPrade v. Kidder Peabody & Co. Inc., 146 F.3d 899, 905 (D.C. Cir. 1998) ("This court has not yet established whether the standard for imposition of sanctions under 28 U.S.C. * * * [section] 1927 should be 'recklessness' or the more stringent 'bad faith.'") But see Reliance Ins. Co. v. Sweeney Corp., Md., 792 F.2d 1137, 1138 (D.C. Cir. 1986) (stating that bad faith is not required).

The venue for appeal of the sanctions we impose on Mr. Wallis is unclear. It may be to the U.S. Court of Appeals for the District of Columbia Circuit. See sec. 7482(b)(1) (second sentence); Byers v. Commissioner, 740 F.3d 668 (D.C. Cir. 2014), aff'g T.C. Memo. 2012-27. But compare Johnson v. Commissioner, 289 F.3d 452 (7th Cir. 2002) (affirming Tax Court's imposition of section 6673(a)(2) penalty without discussing venue), aff'g 116 T.C. 111 (2001), with Dornbusch v. Commissioner, 860 F.2d 611 (5th Cir. 1988) (appellate venue lies in the U.S. Court of Appeals for the District of Columbia Circuit under the second sentence of section 7482(b)(1) in the case of an appeal of a criminal contempt sentence imposed on a witness by the Tax Court). If the appellate venue for Mr. Wallis is not the U.S. Court of Appeals for the District of Columbia Circuit, it is likely the U.S. Court of Appeals for the Ninth Circuit. See sec. 7482(b)(1)(A).

Mr. Wallis' conduct would constitute bad faith under the Ninth Circuit standard. See e.g., Primus Auto. Fin. Servs., Inc. v. Batarse, 115 F.3d 644, 648 (9th Cir. 1997) ("A finding of bad faith is warranted where an attorney 'knowingly or recklessly raises a frivolous argument, or argues a meritorious claim for the purpose of harassing an opponent.'") (quoting In re Keegan Mgmt. Co., Sec. Litig., 78 F.3d 431, 436 (9th Cir. 1996)). Accordingly, he meets the stricter of these two standards, so it does not matter for our purposes to which circuit an appeal would lie.

Mr. Wallis' record of asserting frivolous claims before this Court and other courts which has led to him and his clients being sanctioned may be considered in determining whether he had bad faith in asserting frivolous arguments in this case. See Johnson v. Commissioner, 289 F.3d at 456-457. "[I]ndeed * * * [we] would have be remiss not to consider it." Id. (citing S Indus., Inc. v. Centra 2000, Inc., 249 F.3d 625, 628-629 (7th Cir. 2001), In re Joint E. & S. Dists. Asbestos Litig., 22 F.3d 755, 759 n.8 (7th Cir. 1994), Fink v. Gomez, 239 F.3d 989, 992 (9th Cir. 2001), and Doering v. Union Cnty. Bd. of Chosen Freeholders, 857 F.2d 191, 197 n.6 (3d Cir. 1988)). Further, "dogged good-faith persistence in bad conduct

becomes sanctionable once an attorney leans or should have learned that it is sanctionable." Johnson v. Commissioner, 289 F.3d at 457 (citing Christiansburg Garmet Co. v. EEOC, 434 U.S. 412, 422 (1978), and In re TCI Ltd., 769 F.2d 441, 445 (7th Cir. 1985)).

Mr. Wallis knew, or should have known, that some of the positions raised in his filings were frivolous, yet he continued to advance them. Further, he failed to appear at trial to represent his clients. Mr. Wallis' actions while he represented petitioners unreasonably and vexatiously multiplied the proceedings before this Court and his actions support a finding that he acted in bad faith. See Primus Auto. Fin. Servs., Inc. v. Batarse, 115 F.3d at 648. Mr. Wallis' persistence in advancing frivolous arguments after having been warned that such conduct is sanctionable, and actually having been sanctioned for such arguments, also supports a finding that he acted in bad faith. Mr. Wallis unreasonably and vexatiously multiplied the proceedings before this Court in bad faith and is subject to sanctions pursuant to section 6673(a)(2).

Attorneys' fees awarded under section 6673(a)(2) are computed by multiplying the number of excess hours reasonably expended on the litigation by a reasonable hourly rate. The product is known as the "lodestar" amount. Harper v. Commissioner, 99 T.C. at 549. The hourly rate properly charged for the time of a Government attorney is the "amount to which attorneys of like skill in the area would typically be entitled for a given type of work on the basis of an hourly rate of compensation." Id. at 551.

Respondent requests a sanction of $36,300 be imposed on Mr. Wallis pursuant to section 6673. This amount excludes time spent by respondent's counsel for: (1) work performed prior to Mr. Wallis' entry of appearance; (2) 10 hours of time spent by each Robert Cuatto and Michael Lloyd spent discussing the case so that Mr. Cuatto could try the case; (3) an 18% reduction of the time spent by each Robert Cuatto and Michael Lloyd to account for time spent on addressing the levy that was issued after the CDP hearing was requested; (4) an additional 6.75 hours of Michael Lloyd's time spent on the case; (5) time spent attending to case closing procedures; and (6) time spent by respondent's attorneys who had less involvement in the case. Respondent is only able to provide generalized descriptions of time spent by his attorneys.

Upon review of the information provided, we do not believe that respondent's requested reimbursement represents solely excessive hours. With the exception of petitioners' Motion for Summary Judgment, Mr. Wallis' motions and

filings were made in the ordinary course of litigation. We find that one quarter of the hours worked by each of respondent's attorneys should be deemed excess hours, and that the following represents a reasonable amount of the excess hours worked by respondent's counsel in this case: (1) 10.25 of the 41 hours worked by Associate Area Counsel Jan Robert Cuatto; (2) 45.33 of the 136 hours worked by Attorney Michael Lloyd; (3) 19 of the 57 hours worked by Attorney Hilary March; and (4) 5 of the 15 hours worked by Supervisory Attorney Bridget Tombul.

Mr. Wallis asserts that the rate of $200 per hour for Mr. Cuatto, Mr. Lloyd and Ms. March, as well as the rate of $250 per hour for Ms. Tombul, is excessive and unreasonable. We disagree with Mr. Waltner and find that these rates were reasonable given the attorneys' experience and location. See also, Steven T. Waltner and Sarah V. Waltner, docket No. 1729-13, Order dated December 15, 2014, where these amounts were found to be reasonable.

Having established the compensable hours and the reasonable hourly rate we calculate the "lodestar" amount as follows:

Attorney	Hours Allowed	Hourly Rate	Total
Ms. Tombu	3.75	$250	$937.50
Ms. March	14.25	$200	$2,850.00
Mr. Lloyd	34.00	$200	$6,800.00
Mr. Cuatto	10.25	$200	$2,050.00
Total			12,637.50

In consideration of the foregoing, it is hereby

ORDERED that the order to show cause dated August 10, 2015, as regards petitioners' former counsel, is made absolute. It is further

ORDERED that petitioners' former counsel, Donald W. Wallis, shall personally pay excess costs of $12,637.50 to respondent pursuant to section 6673(a)(2), that he shall make payment by means of a certified check, cashier's check, or money order in favor of the Internal Revenue Service, that such payment may be delivered to respondent's counsel at Office of Associate Area Counsel, Suite 300 North, 600 17th St., Denver, CO 80202, not later than 30 days from the

date this order is served, and that respondent shall report to the Court in writing if such payment is not timely received.

ORDERED that in addition to regular service the Clerk of the Court is directed to serve a copy of this Order on Donald W. Wallis, Upchurch, Bailey & Upchurch, PA, 780 North Ponce de Leon Blvd., St. Augustine, FL 32084.

(Signed) Harry A. Haines
Judge

Dated: Washington, D.C.
March 3, 2016